Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's	)	
Regulations Governing Attribution	)	MM Docket No. 94-150
of Broadcast and Cable/MDS Interests	)	
	)	
Review of the Commission's	)	
Regulations and Policies	)	MM Docket No. 92-51
Affecting Investment	)	
in the Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy	)	

COMMENTS OF MEDIA ACCESS PROJECT, *et al.*

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SUMMARY

Commenters praise the Commission for considering these reforms of its attribution rules, and welcome this long-overdue initiative. The Commission's attribution rules are vitally important: they are the foundation upon which the multiple and cross ownership rules are built. Without effective attribution rules, Congress could mandate, and the Commission could adopt, nearly ***any*** ownership limits - no matter how restrictive and no matter how clearly worded - and would not be able effectively to enforce them. Instead, parties could craft complicated financial structures which give them a vise-like grip on a station's operations, but would avoid application of the current law.

There can be no doubt that the current rules have broken down: recent years have seen cases which shock the conscience for their laxity. As just a few examples out of many, all of the following interests have been held ***not attributable*** under the Commission's current rules:

- One program supplier holding 25% of total common stock as nonvoting shares, 100% of preferred stock, contributing 2.5 million in additional capital, having an option to buy up to 50% of common stock, and other contractual rights.
- A cable MSO holding $3 million nonvoting stock, in a company which only had $100 worth of voting stock, along with substantial capital contributions.
- A group owner holding 43% of outstanding debt and 33% of all outstanding equity as nonvoting shares, and guaranteeing a loan for an additional 42% of outstanding equity.

Does anyone really pretend that these investors could not exert their will over the editorial decisions of the licensees? Would any rational station executive say "no" to these 800-pound gorillas? The time for change has come.

Two of the specific proposals in the Commission's notice would effectuate this change, but another would be a big step in the wrong direction. The first proposal, the Equity or Debt Plus rule, would target those investors - program suppliers and same market media entities - that stand in a

position to influence licensee decisions unduly. Yet it would not prevent such investments outright, and would not injure licensees' ability to raise capital. As a simple bright-line rule, it enables public accountability, avoids the patchwork quilt of decisions under the current case-by-case approach, and improves the ease of application by the Commission. Indeed, Commenters have only two reservations. First, the proposed threshold level of investment - 33% - is so high that it excludes many investors that should be included. Instead, Commenters suggest a 20% threshold. Second, the proposal would allow an investor to have 32% holdings of debt and equity but still avoid attribution. As a suggested remedy, therefore, the commission should also attribute investments which reach ***two-thirds***, *e.g.* 22%, of the threshold percentage in ***any two*** categories: total equity, total debt, or total capitalization.

After many years of avoiding the issue, the Commission asks whether to attribute television LMAs toward their holder's ownership. Commenters believe that the Commission should go one step further and prohibit LMAs altogether. Among their many outrageous flaws LMAs are, and have always been, a violation on the Communications Act's prohibition on unauthorized transfers of control. If the Commission should continue to allow LMAs, however, Commenters strongly support its proposal to attribute them.

Finally, Commenters oppose the proposal to double the attribution thresholds for voting stock holdings of both active and passive investors, to 10% and 20% respectively. It strains credibility to think that these investors could hold 9.9%, or even 19.9%, of all voting shares and ***not*** wield influence. In four years of asking, the Commission ***has not received one iota of proof*** showing that raising the benchmark will help raise capital and will not harm diversity. It should finally say "enough is enough," and reject this proposal.

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Media Access Project, Black Citizens for a Fair Media, the Center for Media Education, the Minority Media and Telecommunications Council, National Association for Better Broadcasting, the Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, and Women's Institute for Freedom of the Press ("Commenters"), respectfully submit these comments in response to the Commission's review of its broadcast ownership attribution rules, *Further Notice of Proposed Rulemaking*, MM Docket Nos. 94-150, 92-51, 87-154 (released November 7, 1997)("*FNOPR*").

The Commission has proposed to adopt several reforms to its present attribution rules, the regulations by which it defines "what constitutes a 'cognizable interest' in applying the multiple ownership rules." *FNOPR* at ¶1.[1] The rules seek to identify interests "that confer on

[1]The broadcast attribution rules are set out in the notes to 47 CFR §73.3555. Currently, the Commission will attribute - count an entity's interest in a licensee toward the ownership limits - 5% of a licensee's voting stock held by active investors, 10% voting stock held by passive

their holders a degree of influence or control such that the holders would have a realistic potential to affect the programming decisions" or other operating functions of licensees. *Id.* The *FNOPR*, although a continuation of an earlier *Notice of Proposed Rulemaking*, 10 FCCRcd 3606 (1994) ("*1994 NOPR*"), seeks to update the consideration of these proposed reforms in light of the deregulatory provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104 (1996) ("1996 Act").

I. INTRODUCTION

Commenters welcome this long-overdue initiative. The proposals presented in the *FNOPR* will improve the accuracy, efficacy, and clarity of the attribution rules. They will also greatly streamline regulatory oversight, and better effectuate the will of Congress in adopting statutory ownership limits, because they better identify all interests that are relevant to the underlying purposes of the multiple ownership rules.

At the outset, commenters wish to refer the commission to their discussion on pages 1-11 of the comments filed today in the Commission's proceeding to review its local multiple ownership rules. A copy of this discussion has been supplied as Appendix A to these comments. Comments of Media Access Project, *et al.*, in response to *Second Further Notice of Proposed Rulemaking*, MM Docket Nos. 91-221, 87-7 (released November 7, 1996)("MAP, *et al.* Duopoly Comments"). Because the Commission has divided its review of broadcast ownership rules into four concurrent overlapping proceedings, the remarks on those pages address several of the issues

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investors, partnership interests except for certain limited partnerships, and positions as officers or directors. Minority stockholdings in corporations with a single majority shareholder, nonvoting stock holdings, nonvoting interests such as options or warrants, and debt are not attributable. *See FNOPR* at ¶3 n. 5. *See also* 47 CFR §76.501 (broadcast-cable cross ownership attribution rules).

common to each of these dockets. In particular, commenters address erroneous assumptions the Commission has made about the nature of the marketplace of ideas and the ability of an increasingly concentrated broadcast industry to contribute to diversity in that marketplace. *Id.*

The importance of the Commission's attribution rules cannot be overstated: they are the foundation upon which the multiple and cross ownership rules are built. Without effective attribution rules, Congress could mandate, and the Commission could adopt, nearly ***any*** ownership limits - no matter how restrictive and no matter how clearly worded - and would not be able effectively to enforce them. Parties could structure investments which had all the same impact on viewpoint diversity as outright ownership, but which did not violate the letter of the rules.

Indeed, this sort of evasion has been epidemic under the existing rules. The last decade has brought a legion of examples of parties sidestepping the ownership rules by taking advantage of loopholes and ambiguities in the attribution rules. To exacerbate matters, the Commission's staff has been overly permissive, and may even have sent signals about the types of structures that would pass review. The result has been cases which shock the conscience for their laxity in allowing parties to circumvent multiple and cross ownership rules. And these are only the cases where parties have discovered the violations and challenged them - there is no way of determining how many examples have gone undetected. Some examples from only the last two years:

- In one pending challenge, a group owner not only holds at least 5 same-market LMAs, but has created a separate company, with 97% of the equity held by the president's ***mother***, to hold stations in and enter into LMAs with the group owner in many of the same markets. In case there is any doubt that the group owner controls the separate company, it holds $6.7 million in debt and options to acquire up to a 97% equity in the separate company. "Striking it rich with Sinclair,"

Broadcasting & Cable, August 19, 1996, at 27, and inset at 29 (holds 5 same market LMAs that it is "ready to convert to an owned station," and in 3 markets holds a station both as Sinclair and as closely-related Glencairn Ltd.); *e.g. Petition to Deny*, in File No. BALCT-960618IG (filed August 16, 1996). ***Its interests were not attributed.***

- In *BBC License Subsidiary (WLUK-TV)*, a nationwide network held 25% of the total common stock of the licensee in nonvoting shares, with an option to increase common stock holdings to 50% or to convert all nonvoting stock to voting. It also contributed an additional $2.5 million for those shares, and held $3 million, or 100%, of the licensee's preferred stock. It held options for additional stock purchases, conversion of nonvoting stock to voting, approval over major decisions such as lines of business, acquisitions, and sales, approval of the board of directors, and a ten year affiliation agreement. 10 FCCRcd 7926 (1995). *Accord, BBC License Subsidiary (KHON-TV)*, 10 FCCRcd 10968 (1995)(nearly identical facts, with network holding slightly more equity) ***Its interests were not attributed.***

- In *Roy M. Speer*, a large cable MSO held over $3 million in nonvoting preferred stock in an investment company, compared to only $100 total value of all issued voting stock. It provided 21% of the capital for this investment company to purchase a broadcast group owner, which, had it been purchased directly, would have violated the broadcast-cable cross-interest rule in ***all 11*** of the group owners' markets. The MSO also held an option to convert its nonvoting holding into voting stock at such time as it could exercise full control over the stations without violating the Communications Act or Commission rules. 11 FCCRcd 14147 (1996). ***Its interests were not attributed.***

- In *Quincy D. Jones*, a group owner financed 43% of the total debt in a joint venture which purchased two licensees. The group owner also held 33% of the total equity of the venture as nonvoting shares, and guaranteed a loan which enabled its partner to purchase another 42% of the total equity. The group owner's debt was convertible to voting stock upon such time as it could own interests in the licensees without violating ownership rules, and at that time the group owner had the right to purchase control all outstanding voting stock. 11 FCCRcd 2481 (1995). ***Its interests were not attributed.***

Cases such as these offend the very nature of the ownership limits and their underlying goal of promoting viewpoint diversity. They prove that change is needed.

In light of the dramatic deregulation of the broadcast industry, effective and accurate attribution rules are important now more than ever if the Commission is to pay anything more

than lip service to diversity, and to the needs of the viewers. Despite the importance to broadcasters of economies of scale, the Commission should not forget that viewpoint diversity remains "essential to the welfare of the public...." *Associated Press v. US*, 326 U.S. 1, 20 (1945); *NCCB v. FCC*, 439 U.S. 775 (1978). As noted below, many regulatory reforms and industry changes have recently occurred, and will all have a significant impact on viewpoint diversity goals. These include:

- The 1996 Act's elimination of the national radio ownership limits, great relaxation of the local radio ownership limits, replacement of the numerical national television ownership limit with a 35% national audience reach cap, extension of the one-to-a-market waiver policy to the top 50 markets, increases in the license terms for TV and radio licenses, approval of two-step renewals, and removal of the broadcast-cable cross ownership restriction. 1996 Act, §§202-204.

- Pending Commission proposals to modify the duopoly rule, to allow waivers for local television ownership permitting, *inter alia*, UHF/UHF and UHF/VHF combinations. *Second Further Notice of Proposed Rulemaking*, MM Docket Nos. 91-221, 87-7 (released November 7, 1996)("*Local Ownership FNOPR*").

- Recent repeal of the Prime Time Access Rule, and relaxation of the Financial Interest and Syndication rules.

- Pending consideration whether to give networks greater power over affiliates and whether to allow network-affiliate relations to be conducted in secret. *Filing of Network Affiliation Contracts*, 10 FCCRcd 5677 (1995); *Programming Practices of Broadcast Television Networks and Affiliates*, 10 FCCRcd 11951 (1995); and *Broadcast Television Advertising*, 10 FCCRcd 11853 (1995).

- The Commission's ongoing, tacit approval of television LMAs. *See* Comments of Media Access Project, *et al.*, filed today in response to *Local Ownership FNOPR*, at 28 ("MAP, *et al.* Duopoly Comments").

- The pending constitutional challenge to the must carry rules, *Turner Broadcasting v. FCC*, U.S. Supreme Court (No. 95-922), argued October 7, 1996, which many observers have predicted would result in the rules' invalidation.

Because the Commission effectuated these deregulatory actions one at a time, and steadfastly refused to consider their cumulative effect, it is unlikely to have any idea what the

ultimate impact on editorial diversity will be. But the Commission's statutory mandate to serve the public interest ***requires*** it to monitor the effect of these deregulatory changes ***on viewpoint diversity***, not just on the economics of the broadcast industry. Even were it to do so, however, the Commission would face great impediments because parties can circumvent the remaining protections against ownership concentration. If parties can steer around ownership limits through deceptively-structured holdings, the effect of the deregulations on diversity will be much greater than the Commission has supposed.

The Commission, in evaluating whether to attribute a given interest, should follow a simple touchstone test: it should examine whether the party holding an interest would, on the strength of that interest, be able to influence editorial decisionmaking at the station in which the interest is held. This standard effectively protects the Commission's diversity goals because it reflects editorial diversity, and, as commenters have noted, only editorial diversity - as opposed to program diversity - is an adequate indicator of viewpoint diversity. Appendix at 8. Conversely, if the nature of an investor's interest is minute or otherwise insulated so that it could not influence the licensee's editorial decisions, there should be no concern.

If another standard prevailed - if the attribution rules did not count certain minority interests or LMAs that confer a degree of editorial control upon the owner - it would create new loopholes. Parties could structure holdings so as to influence editorial decisions at unlimited numbers of stations. There is no qualitative difference between this and outright ownership of an unlimited number of stations, or stations with an unlimited audience reach, both results expressly disclaimed by Congress. *See* 1996 Act, §§202(b)(local radio caps), 202(c)(national TV audience reach caps). The reforms would leave the attribution rules no more effective than

before and allow evasion of the Commission's remaining multiple and cross ownership rules.

II. THE PROPOSED EQUITY OR DEBT PLUS RULE IS AN EFFICIENT WAY TO IDENTIFY THOSE PARTIES WITH THE ABILITY AND INCENTIVE TO AFFECT EDITORIAL DECISIONS.

The Commission has requested comment on its proposal to adopt a new "equity or debt plus" rule. *FNOPR* at ¶8. This approach would preserve the current attribution exceptions available to single majority and nonvoting shareholders, 47 CFR §73.3555, notes 2(b), 2(f), but would limit their availability in certain circumstances.[2] Specifically, this rule would attribute ownership in cases where the holder of an equity or debt interest in a licensee (1) also holds other significant interests in, or "triggering relationships" to the licensee or other media outlet, and (2) the amount of equity or debt held exceeds certain thresholds. *FNOPR* at ¶12.

Commenters applaud this proposal. This approach will prevent most, if not all, of the abuses that occur when equity or debt holders in a licensee have the power and the incentive to influence the licensee's editorial choices. In this sense, it will prevent parties from using such investments to circumvent the national and local multiple ownership rules, and will thereby serve as a stalwart against further erosion of viewpoint diversity.

A. The Equity or Debt Plus Approach Will Not Unduly Restrict Capital Flow to Licensees.

By targeting only those cases with the potential for abuse, *i.e.* by not fully repealing the single majority and nonvoting shareholder exceptions, this proposal preserves the Commission's

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[2]This approach is narrower than the proposal discussed in the first *Notice of Proposed Rulemaking* in this docket, 10 FCCRcd 3606 (1995), which would have eliminated the nonvoting stock and single majority shareholder exceptions altogether. To that extent, Commenters applaud the Commission for protecting the interests of viewers, while not adopting a rule which is overbroad and unduly discouraging passive capital investments if they are structured so as to prevent influence over a licensee's editorial decisionmaking.

expressed goal of "not unduly disrupting capital flow..." *FNOPR* at ¶13. The approach does not affect investors that exceed the investment threshold but do not stand in a triggering relationship to a licensee.

Indeed, this approach does not even prevent investment by parties that ***are*** in a triggering relationship and exceeding the threshold; it merely attributes their investment toward the ownership limits.

In perhaps only a handful of cases will the attribution of these interests force an investor to run afoul of the multiple ownership rules. These cases would involve highly suspicious financial structures: same-market media entities or program suppliers, holding a significant nonvoting interest in stations that would violate the Commission's rules if counted as an ownership interest. In other words, these cases are crystal-clear examples of investors using the current attribution rules to evade the ownership limits. Thus, adoption of the proposal will effect precisely those parties that use the current rules to the detriment of ownership diversity.

Moreover, and in any event, the Commission must not overvalue the goal of encouraging capital flow to licensees. Most licensees have no problems raising capital in the current market, and would continue to do so even after reform of the attribution rules. In the few cases where the reforms scare investors away, licensees are likely to be able to find other investors willing to step in. This is demonstrated by the feverish pitch of investment in licensees in 1996. The amount of money spent in radio buyouts in 1996 was $14.87 billion, a 315% increase over 1995, and the television buyouts total was $10.49 billion, a 121.3% increase. Donna Petrozzello, "Trading Market Explodes," *Broadcasting & Cable*, February 3, 1997 at 18. Stock prices were also sky high, and continue strong in 1997. One broker noted that "[s]tocks are rising, [and]

capital remains plentiful..." *Id.* at 19. For example, "since the beginning of 1997, radio stocks have rebounded anywhere from 20 percent to 35 percent." *Id.* *See* MAP, et al. Duopoly Comments at 4 n. 4.

Nor will the proposed modifications discourage investors from assisting in the conversion to digital television. The Commission expresses concern that adoption of the "equity or debt plus" approach to attribution might "disrupt the flow of capital to television stations to fund...the conversion to digital television...," which the Commission believes, "will be costly." *FNOPR* at ¶21. It therefore requests comment as to whether tightening the attribution rules would "significantly hinder networks or other telecommunications entities from helping stations to fund the conversion...." *Id.*

The Commission's anxiety about endangering the conversion to digital television is unfounded. First, and most importantly, there is now ample evidence that broadcasters' first estimates of digital conversion costs were grossly inflated. Costs that were once estimated to be as high as ten million dollars are now estimated to be no more than $750,000. Chris McConnell, "Digital TV at doable price, " *Broadcasting & Cable*, January 20, 1997 at 60.[3] Second, even if the attribution rules are tightened, there is enormous incentive for the networks to fund the conversion to digital television for their affiliates. If affiliates cannot transition, networks will be unable to obtain the national coverage necessary to command high prices from

[3]The Commission's statement that it "anticipate[s] [the conversion] to be costly," is an inauspicious admission that neither the agency, nor Congress, has undertaken any effort to determine whether broadcasters have been candid about their cost estimates. Unfortunately, Congress' decision not to auction the so-called "digital" spectrum has been, in large part, rooted in the concern over so-called high transition costs. Similarly, there are indications that some Commissioners may also mistakenly believe that these costs are very high, and that, as a result, broadcasters should not be subject to any new public interest obligations.

advertisers.[4]

Finally, there is little doubt that other investors will flock to fund the conversion to digital television.[5] Digital transmission will permit broadcasters to transmit multiple advertiser supported and subscription services, which will likely increase their revenues enormously. Were the transition to digital not such a potential gold mine, it is doubtful that broadcasters would have fought so hard, and for so long, to obtain the extra spectrum needed for the transition.[6]

B. A Bright Line Rule Is Far Superior to An *Ad Hoc* Approach.

The Commission has also expressed support for the goal of "affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions." *FNOPR* at ¶13. It has invited comment as to whether the equity or debt plus proposal would be preferable to a case-by-case approach that would base attribution on the presence of "contract language that yields control over decisions of concern..." *Id.* at ¶25.

From the standpoint of licensee certainty and administrative ease, and more importantly from the standpoint of effective enforcement, a bright line rule is far superior. Unlike a bright line rule, a case-by-case approach would necessitate protracted and expensive agency fact-finding and review, and thus could be a significant burden on the Commission's resources. Many cases

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[4]With six television networks (and possibly a seventh, Silver King, on the way) there are few true "independent" stations that will not have the aid of a network.

[5]Just one week ago, the National Association of Broadcasters held a briefing on digital TV in New York for investment bankers. "NAB Study to Document Broadcasting Benefits to Public," *Communications Daily*, January 30, 1997 at 3.

[6]For example, one group owner has even likened himself to a farmer of spectrum, tending to the property until the "big pay-off" when digital TV service begins. Chris Stern, "Broadcast Exex Urge Loose Regs," *Daily Variety*, January 14, 1997, at 14.

would require close examination of investment contracts, perhaps leading to hotly-contested litigation. The results could vary widely, as the result of subtle differences in contract language or divergent conclusions of fact-finders, leading to a patchwork quilt of decisions. Moreover, a case-by-case approach invites opportunistic parties to probe for loopholes and avoid enforcement.

Significantly, a case-by-case approach would also provide inadequate opportunity for public review.[7] It would create one or more stakeholders with strong interest and vast resources in litigating to oppose attribution - the investor and perhaps the licensee. Members of the viewing public, although having great interests in diversity of viewpoints as participants in a democratic society, are unlikely to have the intensity of interest, legal knowledge, and depth of resources to mount a meaningful review of contract provisions. In fact, their participation may be completely foreclosed because it will be impossible, or nearly so, for them to obtain the specific investment contracts in order to examine the powers granted.[8] A bright line rule, on the other hand, would assist viewers in participating and acting as "private attorneys general." *See, UCC v. FCC*, 359 F.2d at 1002.

Moreover, Commenters observe that these same goals of administrative efficiency, licensee

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[7]The public's standing to participate in licensing proceedings before the Commission is well-established and longstanding. In *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), then-judge Warren Burger wrote that the court could see "no reason to exclude those with such an obvious and acute concern as the listening audience." *Id.* at 1002.

[8]Furthermore, in those cases where the investor is a network, obtaining contracts will be made even more difficult by the Commission's proposal, in a still-pending proceeding, to discontinue public filing requirements for network-affiliation contracts. *Filing of Network Affiliation Contracts*, 10 FCCRcd 5677 (1995).

certainty, and public participation are also served by the approach taken in the Commission's cross-ownership rules, which are under review in this and another pending Commission proceeding. *FNOPR* at ¶43. Those rules incorporate a bright line standard to determine whether, for example, a cable operator exercises influence over the operations of an MMDS licensee in its franchise area. 47 USC §§533(a). Therefore, the Commission should employ the same reasoning to retain the traditional approach to the cross-ownership rules that here leads it to adopt a single rule for multiple ownership attribution.

C. Both Same Market Media Entity Investors and Program Supplier Investors Should Be Included In The Equity or Debt Plus Rule Because They Have Strong Incentives and Ability To Influence Editorial Decisions.

The equity or debt plus proposal would focus on investing parties that hold other significant interests in the licensee. In this way, the rule will focus "directly on those relationships that may trigger situations in which there is significant incentive and ability for the otherwise nonattributable interest holder to exert influence such that the interest may implicate diversity and competition concerns..." *FNOPR* at ¶14. The Commission has identified two specific categories of interest that would trigger concern: broadcasters or certain other media entities operating in the same market, and program suppliers. *Id.* It invites comment on whether to include these categories and how to define them.

1. Same Market Media Entities.

The Commission has asked whether to include same market media entities within the scope of interests that would trigger the application of the equity or debt plus approach. It suggests that "[f]irms with existing local media interests could use financing or contractual arrangements...to obtain a degree of horizontal integration within a particular local market that should

be subject to local multiple ownership limitations." *FNOPR* at ¶16. It also asks what type of media entities to include, such as broadcast television and radio, daily newspapers, and cable operators. *Id.*

Commenters urge the Commission to include all these same market media entities ("SMMEs") in the equity or debt plus approach. An SMME - including broadcast, cable, and daily newspaper - that holds an investment interest in a licensee would have both the ability and incentive to influence editorial decisionmaking at that station, and would therefore significantly limit editorial diversity.

The ability of an equity or debt holding SMME to affect the program decisions of a media outlet becomes apparent in light of a number of extreme cases which have come before the Commission. *E.g., Roy M Speer*, 11 FCCRcd 14147 (1996)(large cable MSO held over $3 million nonvoting preferred stock, compared to $100 voting common stock, and held option to convert nonvoting into voting stock at such time as it could avoid "violating the Communications Act or Commission rules"). An SMME may have a number of incentives to influence the station's editorial decisionmaking, including preventing expression of a particular, disfavored viewpoint or speaker; avoidance of programming decisions which would compete with the SMME's own content; or encouraging a selection of information which promotes the SMME's own content or other business interests.

Therefore, failing to adopt this proposal, *i.e.* allowing SMMEs to hold a minority equity stake or debt without attribution, would seriously undermine the goals of the local ownership rules and cross-interest rules. A media entity could spin a web of nonattributable equity or debt holdings in many, if not most, of the competitors in its locality. With this influence, it could

dramatically affect the licensee's editorial decisionmaking. In the extreme case, many local media outlets could invest in each other, creating a system of interlocking media ventures, with very little viewpoint diversity.

The Commission has tentatively concluded that both radio and television broadcasters could be included as SMMEs. *FNOPR* at ¶16. Commenters agree with this conclusion. A same market broadcaster would have strong incentive to control the editorial decisionmaking of a licensee, for example, to foreclose expression of a particular viewpoint or speaker, or to reduce competition for advertising revenue. The reduction in viewpoint diversity from common editorial control of local broadcasters has been well documented, and is the very purpose of the Commission's local ownership restrictions. MAP, *et al.* Duopoly Comments at 9.

The Commission has also tentatively concluded that cable operators and daily newspapers should be subject to the equity or debt plus approach, just as they are included in its cross-ownership rules. *FNOPR* at ¶16. The incentives and ability for cable operators and newspapers are nearly the same as broadcasters. Cable operators and newspapers with an equity or debt interest in a licensee would have incentives to influence editorial control, such as competing for advertising revenue, opposing certain viewpoints and speakers, or cross-promotion. Indeed, the Commission's cross ownership rules are directed toward preventing precisely this type of influence. *See, e.g., Report and Order*, Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 97 FCC 2d 997, 1004 (1984)("*1984 Attribution Order*").

2. Program Suppliers.

The Commission questions whether to include program suppliers under the equity or debt plus attribution approach. This, it says, may address its concern that program suppliers, such

as networks, syndicators, and LMA holders could use minority equity or debt interests to influence editorial decisionmaking. *FNOPR* at ¶17. It also asks how to define the category of program supplier, and how to treat entities that hold interests in the program supplier. *Id.* at ¶20.

Commenters support the Commission's inclusion of program suppliers in the equity or debt plus approach, because such entities have a clear, powerful incentive to influence the editorial discretion of a licensee and thereby reduce viewpoint diversity. Specifically, there are sound reasons for including networks,[9] syndicators, program producers, and LMAs in this proposal.

The ability of all these entities to influence programming is clear,[10] as it was for same market media entities, and the Commission has seen cases where program suppliers structure equity and debt interests which flagrantly desecrate the spirit, if not the letter, of the attribution rules. *See, e.g.*, *BBC License Subsidiary*, 10 FCCRcd 7926 (1995)(program supplier held 25% of total common stock as nonvoting shares, with an option to increase to 50%, option to convert all nonvoting stock to voting, contributed an additional $2.5 million for those shares, and held 100% of preferred stock).

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[9]Commenters also believe that there should be no difference for purposes of the attribution rules between the major networks, ABC, NBC, CBS, and Fox; emerging networks, such as WB and UPN; and other limited purpose networks, such as TeleNoticias, or sports and religious programming networks. The incentives to influence licensee decisions will be equally strong for all these types of entities.

[10]In fact, this ability is much greater now than it has ever been, a result of many of the Commission's recent actions, such as repeal of the financial interest and syndication rules, prime time access rule, and proposals to repeal most of the rules governing the network-affiliate relationship.

It is equally clear that the various entities proposed for inclusion as program suppliers would have an interest in influencing programming decisions. Their interest could stem partly from a desire to create or maintain demand for their programs, or a desire to obtain more favorable price terms. Thus, for example, a syndicator or a program producer might use a minority equity stake to encourage a licensee or group owner to carry a specific program, to carry a package of two or more programs when he would otherwise carry only one, and to pay a higher price or more barter time. A network might use its influence to persuade a station or group owner to affiliate with it, to prevent rejection of certain programs, to carry a greater portion of the network's feed, or to demand less compensation in its affiliation agreement. An LMA holder might use its influence to create or continue the LMA relationship, to influence payment to the licensee, or to prevent rejection of certain programming or other exercises of licensee control.

Moreover, and most important, program suppliers could wield the influence derived from a minority equity or debt interest directly to affect the flow of information from the licensee. For example, a program supplier may prevent a news report, station editorial, or other program selection which is adverse to its own interest (or the interests of its investors), or may force dissemination of information which helps its interests. A program supplier may also distort news or station editorials which oppose its political or social beliefs. In either case, there is a severe risk of a reduction in editorial diversity, which should be attributed toward the multiple ownership limits.

D. The Investment Threshold of the Equity or Debt Plus Rule Should Look Across Both Equity and Debt Holdings, and Should Count All Holdings Greater Than Twenty Percent.

The Commission's equity or debt plus proposal would attribute ownership to an entity,

standing in a triggering relationship to a licensee, if that entity holds equity or debt in an amount exceeding certain thresholds. The Commission proposes to aggregate all equity holdings (*i.e.* non-voting and voting stock in whatever form), and to apply a similar aggregation approach for debt holdings. *FNOPR* at ¶22. It continues that attribution would be triggered when an investor's aggregated equity, aggregated debt, or the sum of the two exceeds a specified threshold percentage of the licensee's total equity, debt, or total capitalization respectively. *Id.* It invites comment on this proposal, as well as on a tentative proposal to set the threshold percentage at 33%. *Id.* at ¶23.

The Commission's overall approach to aggregation of equity and debt holdings is generally sound, but has two serious shortcomings. The first is that it would allow parties to circumvent the rule by structuring investments that fall just short of the separate threshold percentages for debt ***and*** equity. To use a numerical example, with a 33% threshold, an investor could hold 32.5% of equity and 32.5% of debt and still would not trigger attribution, while another investor might hold 33.5% of equity and zero debt but would be attributed. It is unfathomable to find the former interest non-attributable and the latter attributable. *See, BBC License Subsidiary L.P. (WLUK-TV)*, 10 FCCRcd 7926 (1995)(statement of Commissioner Ness, "In circumstances such as these, the whole is greater than the sum of its parts.").

Commenters propose the following solution. In addition to the Commission's approach of examining a party's investments in aggregated equity, debt, and total capitalization, the Commission should look across all three. If an entity holds interests in any ***two*** categories which measure two-thirds as great as the threshold percentage, the Commission should attribute ownership to that party. This additional approach would recognize, going back to the numerical

example, that any party holding 22% of the equity ***in addition to*** 22% of the debt would still wield enough influence to affect editorial decisionmaking.

The second flaw in the Commission's proposed investment thresholds is that it is underinclusive. The proposed benchmark percentage, 33%, is so high that it will overlook many investors with significant power to affect editorial decisions. Indeed, it seems that the amount, 33%, has been plucked out of thin air. The only support for this number the Commission cites is an eleven year old case ***predating both the current formulation of the attribution and ownership rules and the recent dramatic changes in the broadcast industry***, to try to show an example where it has allowed a nonattributable equity interest of 33 percent. *FNOPR* at ¶23.

But the Commission's factual finding in that case was specifically rejected on review in the United States Court of Appeals for the District of Columbia Circuit, although the ultimate holding was affirmed on other grounds. In *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984), the court held that, "contrary to the Commission's assertions...," an investor's 33% "preferred stock ownership does not constitute a merely passive interest in [the licensee]." *Id.* at 971. "An owner of one-third of a corporation's equity may, of course, exercise control in fact, especially if the one-third share represents the largest voting block in the corporation." *Id.* at 967. It went on to state, however, that the decision not to apply the cross-ownership rules in that case was not an abuse of authority, based on the Commission's review of all other facts and circumstances, and its general authority to engage in case-by-case inquiries. *Id.* at 971. If anything, *Cleveland Television* stands for the proposition that a 33% nonvoting interest - or even less - ***does*** give control to the investor.

Yet parties can exercise control over station operations with investments much smaller

than 33%. The Commission has seen many instances of nonvoting equity or debt holders exercising very real and substantial control over station operations and editorial decisionmaking. See page 4, above. *See also, Fenwick Island Broadcast Corp.*, MM Docket No. 87-236 (1990)(debt holder could require 50% premium on payback, secured by option to purchase station outright); *Evergreen Broadcasting Co.*, MM Docket Nos. 84-397 through 84-412 (1989)(same).

Alarmingly, the Commission has kept the public in the dark about the effect of its choice of proposed triggering percentage. For the purpose of reasoned policymaking in this area, and for the purpose of meaningful public comment, it would be extremely useful to examine the breakdown of sizes of nonvoting stock interests. This is precisely the type of data that the Commission released in its study of the 1994/95 annual TV ownership reports, and indeed, that study releases distributions of percentage ownership interests for many types of holdings, including active and passive voting stock. *FNOPR* at Appendix B. Nonvoting stock was the only type of investment that the study did not detail. *Id.* at part IX. It merely noted that there were 79 instances of non-voting interests - a number which is not insignificant especially when compared to the total of 203 widely held, for-profit stations.

Therefore, commenters support a benchmark percentage of 20%. It is reasonable to conclude that above this level, an investor in nonvoting equity or debt would begin to hold enough control to influence editorial decisionmaking.

Finally, the Commission should emphasize that it can and will continue to look beyond the bright-line rule in extraordinary cases to examine other indicia of ownership.[11] Although the

[11]While the Commission will always consider all indicia of ownership, it should pay particular attention if the ownerhsip concerns are raised in a petition to deny.

Commission will gain considerable advantages and administrative economy through a simple rule, it should not willfully turn a blind eye to cases that evade the letter - but not the spirit - of its rules.

III. LMAs GIVE THEIR HOLDER NEARLY TOTAL CONTROL OVER THE EDITORIAL DECISIONS OF THE LICENSEE, AND THE COMMISSION SHOULD ATTRIBUTE THEM.

The Commission has also asked a number of questions concerning whether to attribute television LMAs. It notes that under its current rules, brokerage between same market radio stations for over 15% of the brokered station's ("licensee") time results in attribution to the brokering station ("LMA holder"). *FNOPR* at ¶26. It proposes to apply the same principle to same market television LMAs. *Id.* at ¶27.

To begin with, Commenters advocate that the Commission should go one step further and prohibit LMAs altogether. As discussed in the MAP, *et al.* Duopoly Comments, LMAs are an unlawful evasion of the ownership rules; an abrogation of broadcasters' public trustee obligations; permit a transfer of control without Commission review, in violation of the Communications Act; and an affront to both diversity and competition. MAP, *et al.* Duopoly Comments at 28.

If the Commission should continue to allow LMAs, however, Commenters strongly support its proposal to attribute them,[12] because television LMAs, like radio LMAs, result in a diminution of voices and viewpoint diversity. The principle here is simple: LMAs give the holder nearly total editorial control over the licensee's programming, at least for the duration brokered. This makes them another powerful weapon, which has been tacitly endorsed by the

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[12]Commenters' only question to the Commission on this proposal is "What took you so long?" Many of the parties filing these comments have opposed the use of LMAs since they first appeared in the early 1990s. *See* MAP, *et al.* Duopoly Comments at 28.

Commission, to evade multiple and cross ownership limits.

Few industry observers would lend any weight to the required representation by the licensee that it retains editorial authority. Indeed, no evidence has ever been presented in this proceeding that licensees could ever or have ever challenged or modified the LMA holder's editorial choices. *C.f.*, comments filed in response to *1994 NOPR*, in MM Docket Nos. 94-150, 92-51, 87-154. In effect, an LMA is nearly indistinguishable from an outright transfer in which the transferror retains a small, passive interest.

Moreover, LMAs allow their holders blatantly to avoid the Commission's ownership limits - and indeed they have done so. In a recent tally of the top 100 markets, *Broadcasting & Cable* found 40 LMAs in 35 markets. Chris McConnell, "Consolidation Yea or Nay," *Broadcasting & Cable*, January 27, 1997 at 4. All of these violate the intent of the duopoly rule - to maintain diversity of local television outlets by preventing one entity from owning two out of a limited number of local outlets - and the Commission's failure to attribute LMAs enables this violation. LMAs could also allow holders to violate the intent of the national ownership caps - by combining outright ownership and LMAs to reach over 35% of the national audience.[13]

The notion that LMAs may rescue struggling licensees is irrelevant for purposes of the ownership rules. Same market LMAs do not preserve the number of editorial voices in a market, they reduce them by one. Indeed, there is evidence that common station operations actually decrease, not increase, public affairs and informational programming. MAP, *et al.* Duopoly Comments at 9. In light of the recent strength of the market for purchase of licensees, it is likely

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[13]For example, in the Dallas-Ft. Worth market, New World holds an LMA over KDFI, clearly extending the number of households it reaches. The combined holding of News Corp/New World owned stations already reaches 34.841% of the national TV audience. *Id.*